

Under Captain's Court of the  
NILE RIVER

JAN 10 1890

John A. Smith,  
Clerk.

THE COURT OF THE NILE RIVER,

Under Captain's Court of the Nile River

CHIEF OF THE NILE RIVER

JOHN A. SMITH, Clerk.

Under Captain's Court of the Nile River

# In the Supreme Court of the United States.

No. 413.

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ELIZA COOPER *et al.*,  
PLAINTIFFS IN ERROR,  
*VS.*

EDWARD S. NEWELL and CLARENCE B. SMITH,  
Executors, etc.,  
DEFENDANTS IN ERROR.

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Certified Question from the United States Circuit Court  
of Appeals for the Fifth Circuit.

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## BRIEF FOR DEFENDANTS IN ERROR.

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### STATEMENT.

The question certified in this case is, can a judgment of a state court of general jurisdiction be attacked collaterally in a Circuit Court of the United States sitting in the same territory in which said District Court sat, by evidence *aliunde* of the record of the state court showing that the defendant in said court was not a resident of such state at the time the suit was brought, nor a citizen of said state, but a resident citizen of another state, and that he was not cited to appear, and that he did not have any knowledge of said suit, and that he did not in fact appear nor authorize anyone to appear for him, and that any purported appearance for him was made without his knowledge or consent.

To a proper understanding of this question a statement with reference to the character of the judgment sought to be attacked in this case, condensed from the statement accompanying the certificate, is necessary.

On the 20th day of May, 1850, a petition was filed in the District Court of Brazoria County, Texas, by one Peter McGrael against Stuart Newell to recover several tracts of land, among them the land in controversy in this suit. This latter tract was situated in Harris County, Texas. The District Court of Brazoria County had not the venue so far as said tract of land is concerned, it being alleged in said petition that Stuart Newell was a resident citizen of Brazoria County, State of Texas, and the Texas statute providing at the time that all suits for the recovery of land must be brought in the county in which the land was situated. Paschal's Digest, Art. 423. *Wilson vs. Kyle*, 35 Texas, 559.

The petition was in ordinary form of an action of trespass to try title under the Texas statutes. This action is analogous to, but not identical with, the common law action of ejectment. Under this statute suit may be brought upon an equitable title, upon an inchoate title, for possession only, for title only, or for both possession and title, and even to remove cloud from title.

At the time said suit was brought there was no special statutory provision providing for the manner in which service in such an action could be had on a non-resident defendant. There was, however, a statute providing generally that in suits against non-residents, service could be had by publication. This statute provided that if the plaintiff in such a suit, or his agent or attorney, should at the time of instituting the suit, or at any time during the progress thereof, make affidavit before the clerk of the court that the defendant was not a resident of the State of Texas, then a citation should issue which should be published in a newspaper. See Acts of 1848, p. 106. This was a general statute applicable to all suits, whether personal in their character or not. The law further required that where

any judgment was rendered on a suit by publication, that the court should cause to be made out and incorporated with the records of the case a statement of the facts proven and on which the judgment was founded. In the case of said McGrael vs. Newell, it affirmatively appears that no such citation was issued, nor was there any affidavit made to have such citation issued; but on the contrary, the defendant, as heretofore stated, although in fact a non-resident of the State of Texas, was alleged to be a resident of said state. On the same day that said petition was filed, to-wit: on the 20th day of May, 1850, a general demurrer and plea of not guilty was filed by one J. A. Swett, signing himself attorney for defendant, and on the same day an order was entered by the court overruling the demurrer. On the following day, to-wit: May 21st, 1850, a judgment was rendered in favor of plaintiff, it being recited therein that the parties came by their attorneys. The above constitutes the entire record of that case.

The present suit was brought in the United States Circuit Court for the Eastern District of Texas by Stuart Newell, the defendant named in the said suit of McGrael vs. Newell, and said Stuart Newell having died during the pendency of the suit and before judgment, his legal representatives were made parties plaintiff. Upon the trial of the case in the Circuit Court a judgment was rendered in favor of the plaintiffs upon proof showing that at the time of the institution of said suit of McGrael vs. Newell, the said Stuart Newell was not a resident of the State of Texas, nor in said state; that he was a resident citizen of the State of New York; that he knew nothing of said suit, had no notice whatsoever of same, never appeared in fact in said suit and never authorized said Swett, or anyone else, to appear for him in said suit, and that he had not in any manner been cited or notified of said suit, nor to make an appearance therein; and that his first knowledge of said suit was received a great many years after the entry of said judgment. It was contended in the Circuit Court and in the United States Circuit Court of Appeals by plaintiffs in error that the said judgment

of McGrael vs. Newell could not be attacked collaterally in this suit, and that as to the United States Courts said judgment was a domestic judgment although rendered in a state court.

In response to this contention, I submit the following propositions:

#### FIRST PROPOSITION.

The judgment of the District Court of Brazoria County, Texas, is not a domestic judgment in the sense same would be if attacked in a court of that state. As to the United States Courts, it occupies the same position as would the judgment of any other state. Only such faith and credit will be given it as will be given to a judgment of any other state. As to the courts of the United States, it is the judgment of a court of an entirely separate sovereignty. This being true, the settled rule in the Federal Court is, that such judgment can be attacked collaterally and proof of want of jurisdiction of either subject matter or person made, although such proof contradicts the recitals in the judgment or the record on which same was entered.

#### AUTHORITIES.

- Thompson vs. Whitman, 85 U. S., 407.  
First Nat'l Bank vs. Cunningham, 48 Fed. Rep., 514.  
Reinach vs. Atlantic, etc., Ry., 58 Fed. Rep., 42.  
Citizens Bank vs. Brooks, 23 Fed. Rep., 21.  
Knowles vs. Gas Light Co., 19 Wallace, 61.  
Holt vs. Mendenhall, 21 Wallace, 454.  
Hall vs. Lanning, 91 U. S., 165.  
Kilbourn vs. Thompson, 103 U. S., 197.  
Reno vs. Abbott, 116 U. S., 287.  
Hanley vs. Donohue, 116 U. S., 4.  
Simmons vs. Saul, 138 U. S., 448.  
Grover & Co. vs. Radcliffe, 137 U. S., 294.  
Guaranty & Trust Co. vs. Green Cove R. R., 139 U. S.,  

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Shelton vs. Tiffin, 6 How., 186.

Aldrich vs. Kinney, 4 Conn., 380.  
McEwan vs. Zimmer, 37 Mich., 776.  
People vs. Dawell, 25 Mich., 265.  
Andrews vs. Herriott, 4 Cow., 524, and note.  
McDermitt vs. Clary, 107 Mass., 501.  
Kerr vs. Kerr, 41 New York, 272.  
Hoffman vs. Hoffman, 46 New York, 30.  
Bosworth vs. Van de Walker, 53 New York, 597.  
Kerr vs. Candy, 9 Bush (Ky.), 372.  
Garrison vs. McGowan, 48 California, 592.  
Ferguson vs. Crawford, 70 New York, 253.  
Galpin vs. Page, 3 Sawyer, 93.  
Elliott vs. Piersoll, 1 Peters, 328.  
Gray vs. Larrymore, 4 Sawyer, 638.  
Pennoyer vs. Neff, 95 U. S., 714.  
Swift vs. Meyers, 37 Fed. Rep., 44.  
McVoye vs. Cohen, 13 Peters, 312.  
Borden vs. Fitch, 15 Johns, 140.  
Williamson vs. Berry, 49 U. S., 541.  
Webster vs. Reid, 11 How., 460.  
Hollingsworth vs. Barber, 4 Peters, 475.

## SECOND PROPOSITION.

It will be insisted by plaintiff in error that the proceeding in the case of Cooper vs. Newell was in the nature of a proceeding *in rem*, and that therefore the judgment can not be collaterally attacked unless the want of jurisdiction over the person is apparent from the face of the record in that case. To this I reply that whilst this rule might be applicable with reference to domestic judgments strictly, it does not apply to judgments of the courts of a different sovereignty than that in which the right under such judgment is asserted and that the judgment of a state court will not be treated as a domestic judgment when asserted in the Courts of the United States Government, and I submit that this contention is borne out by the authorities hereinabove cited. In addition to this, it appears upon the face of the record in the case of McGrael vs.

Newell that the property in controversy was never taken into the custody of the court by attachment or any other similar proceeding, but that the suit was based entirely upon the statutes of Texas providing a procedure for the trial of title to real estate, and that these statutes contained no provision at the time for process in such suits against non-residents of the state; but that there was a general statute providing for process against non-residents in all suits; that this process was by publication of a citation in some newspaper for a certain specified time and that no judgment could be rendered on said citation at the return term of the court, but the suit had to lie over one term and then the court was required to appoint an attorney for the non-resident defendant, and a statement of the facts proven at the trial was to be made up and incorporated in the record, and two years thereafter was allowed the non-resident to file his motion for a rehearing or review. Even conceding, therefore, that the State of Texas, under its <sup>right as a</sup> sovereign power to provide for the manner in which title to realty might be passed by the judgments of its courts, had provided a statutory proceeding of such a character that when followed a judgment rendered therein upon any character of substituted service could not be collaterally attacked, nevertheless it affirmatively appears from the record in said case of McGrael vs. Newell that none of these statutory provisions had been followed, nor was the court asked by any pleading in the case to follow any of these provisions, but on the contrary, the plaintiff in said suit falsely alleged that the defendant was a resident of the very county in which the suit was filed. All this being true, I submit that whenever it is made to appear that the defendant in said judgment was not a resident of the State of Texas when said suit was filed, the nullity of the entire proceedings then appears affirmatively upon the record, unless it can be held that the recitals in the decree that the defendant appeared by attorney is not only conclusive as to the power of such attorney to make such appearance, but likewise operates to relieve the court from following any of the statutory provisions governing actions of this character against non-residents

as provided by the statute of Texas. I submit that the true rule is as follows:

That by virtue of its authority to regulate the disposition of property within its borders, a state can provide by statute for suits against a non-resident to recover or quiet the title to real estate situated within such state, and can provide the character of citation by publication or other notice necessary to be served on such non-resident in order to make the decree of such court effective as to him to the extent it operates upon the land in litigation. That such proceeding, however, does not come within the court's general jurisdiction over persons and property within the bounds limiting its jurisdiction territorially, and is not in due course of the common law, but is purely statutory, and that all the provisions of the statute regulating same must be strictly complied with; and that where it appears upon the face of the record that these provisions have not been complied with in a suit against a person who is in fact a non-resident at the time of the institution of such suit and when judgment was rendered therein, then anyone claiming under said judgment has the burden of proof to show that the non-resident, whilst not cited to appear, did in fact make an appearance in said suit in such manner as to be bound by its judgment.

#### AUTHORITIES.

- Galpin vs. Page, 3 Sawyer, 93.
- De Arcy vs. Ketchum, 52 U. S., 174.
- Ricketson vs. Richardson, 26 California, 149.
- Woodruff vs. Taylor, 20 Vermont, 65.
- Hamilton vs. Brown, 161 U. S., 264.
- Arndt vs. Grigg, 134 U. S., 316.
- Ear vs. McVeigh, 91 U. S., 503.
- Galpin vs. Page, 18 Wallace, 350.
- Morse vs. Presby, 5 Falst. (New Hampshire), 302.
- The Mary, 9 Cranch., 144.

### THIRD PROPOSITION.

The following is shown by the record herein with reference to said case of McGreal vs. Newell.

1. That no citation ever issued therein. The petition was filed on the 20th day of May, 1850; the answer on the same day.

2. The record nowhere recites any service.

3. The clerk certifies that the record is complete, and no inference can, therefore, be drawn that the fact of service might appear somewhere among the papers in said cause.

4. Neither the judgment on the demurrer nor the final judgment recites an appearance by the defendant in person.

5. The recital that defendant came by his attorney is not a judicial finding that such attorney had authority to so appear, and proof that said attorney had no such authority does not contradict the record.

6. The title to real estate cannot be passed by a decree of court rendered on the appearance of an attorney at law as attorney for a defendant who has never been served when such attorney has in fact no authority to make such an appearance.

7. The court could have acquired jurisdiction over defendant in but two ways: (1) By citation duly served. (2) By the voluntary appearance of defendant in person. It affirmatively appears from the record that no service was had and that defendant did not appear in person. The record shows an appearance by an attorney at law. This appearance could only be binding on defendant when authorized by him, and it is affirmatively shown that he had no such authority.

8. In a collateral attack on a domestic judgment, service may be presumed when the record is silent, but not when the record shows that there was no service. If it is adjudged that a defendant appeared, he cannot attack that finding collaterally when the judgment is a domestic one. If it appears on the face of the record, however, that he did not appear in person, but by attorney only, and that such attorney appeared without service of any process being had on the defendant, the power

of such attorney to make such appearance will not be conclusively presumed and can be inquired into in a collateral proceeding.

AUTHORITIES.

In the brief filed in the United States Court of Appeals by this defendant in error, the authorities hereinbefore cited are reviewed, and to said brief be respectfully call the court's attention, and ask that same be considered in connection with this.

Respectfully submitted,

J. D. Cobble